COURT OF APPEALS
DECISION
DATED AND FILED

December 6, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2285 **Cir. Ct. No. 2009CV1679**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

FRANK RITTER AND NICOLE RITTER,

PLAINTIFFS,

GENERAL CASUALTY INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF-RESPONDENT,

V.

PENSKE TRUCKING LEASING COMPANY, L.P.,

DEFENDANT-APPELLANT,

UNITED HEALTHCARE INSURANCE COMPANY,

INTERVENOR.

APPEAL from a judgment of the circuit court for Rock County: DANIEL T. DILLON, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman, J., and Charles P. Dykman, Reserve Judge.

¶1 SHERMAN, J. Penske Truck Leasing Company, L.P., appeals a judgment of the circuit court dismissing General Casualty from any liability for any claims asserted against Penske by Frank and Nicole Ritter based on the court's determination on summary judgment that General Casualty did not have an obligation to defend Penske against the Ritters' complaint. We affirm.

BACKGROUND

¶2 The Ritters filed a complaint against Penske seeking to recover for injuries allegedly sustained by Frank during a workplace accident. At the time of his accident, Frank was working as a delivery driver for Chambers & Owen Wholesale, Inc. The Ritters alleged in their complaint that on October 22, 2008, Frank was in the cargo area of his delivery truck unloading "several large plastic totes filled with goods" when the light switch inside the cargo area "malfunctioned and failed to illuminate the cargo area of the truck." The Ritters alleged that Frank continued to unload the plastic totes in the dark cargo area and was then struck by several totes, causing him "serious bodily injuries." The Ritters alleged that the truck used by Frank was leased by Chambers & Owen from Penske and that "[t]he problem with the light switch in [the] truck was a longstanding problem that had been previously reported to [] Penske ... on several occasions." The Ritters further alleged that Penske was "negligent in the approval, leasing, regular maintenance, regular examination, and repair" of the truck used by Frank "on the day of the accident" and that Penske's negligence was a substantial factor in causing Frank's injuries.

¶3 In their complaint, the Ritters identified General Casualty, which had paid Frank worker's compensation benefits for injuries Frank sustained in the accident, as an involuntary plaintiff. General Casualty had also issued Chambers & Owen a commercial automobile policy, which identified Penske as an "Additional Insured (Lessor)" under the policy. Penske counterclaimed against General Casualty, alleging that Penske was entitled to indemnification up to the commercial automobile policy's limits of liability.

¶4 General Casualty moved the circuit court for summary judgment against Penske, seeking a declaration that it had no obligation to defend or indemnify Penske for any claims or damages arising from or related to the accident. General Casualty also joined in a motion by Penske for summary judgment against the Ritters.

¶5 The circuit court granted General Casualty's motion for summary judgment. The court ruled that General Casualty did not have an obligation to defend under the commercial policy. The court reasoned that nothing in the four-corners of the complaint alleged any wrongdoing on the part of Chambers & Owen. The court also granted Penske's motion for summary judgment against the Ritters, and dismissed the Ritters' complaint.

STANDARD OF REVIEW

¶6 "We review summary judgments de novo, applying the same methodology as the circuit court." ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***; WIS. STAT. § 802.08(2) (2009-10).

¶7 This appeal requires us to interpret an insurance policy. This presents a question of law reviewed independently of the circuit court's determination. ***Johnson Controls, Inc. v. London Market***, 2010 WI 52, ¶24, 325 Wis. 2d 176, 784 N.W.2d 579.

DISCUSSION

¶8 General Casualty contends that summary judgment was appropriate in this case because the complaint did not allege facts that triggered its obligation to defend Penske.

¶9 Before addressing whether General Casualty had an obligation to defend Penske in this action, we clarify the scope of our review. The parties dispute whether our review is limited to the four corners of the Ritters' complaint or whether we may consider extrinsic evidence. "The proper application of the four-corners rule presents a question of law, which we decide independently of the determinations rendered by the circuit court …." ***Olson v. Farrar***, 2012 WI 3, ¶22, 338 Wis. 2d 215, 809 N.W.2d 1.

¶10 The supreme court has explained the four-corners rule as follows: "'[w]hen a complaint alleges facts that, if proven, would constitute a covered claim, the insurer must appoint defense counsel for its insured without looking beyond the complaint's four corners.'" ***Id.***, ¶31 (citing ***Estate of Sustache v. American Family Mut. Ins. Co.***, 2008 WI 87, ¶27, 311 Wis. 2d 548, 751 N.W.2d 845). The four-corners rule ensures that insurers do not frustrate an insured's expectations of coverage by refusing to defend in the hope that facts, that may emerge in the litigation the insured asked the insurer to defend, will reveal that there is no coverage under the particular policy. ***Id.***, ¶32.

¶11 "[T]he four-corners rule is implicated when the insurer makes an initial determination about whether it will defend its insured [or] … where it is asserted that the insurer breached the contract by wrongly refusing to provide a defense." ***Id.***, ¶33. However, if the insurer has not refused to provide a defense pending a final determination of coverage, the four-corners rule is not implicated and the court may consider extrinsic evidence. ***Id.***, ¶34.

¶12 It is undisputed that General Casualty elected not to provide Penske a defense pending a court's final determination on coverage. The discrete issue with respect to General Casualty's motion for summary judgment was whether General Casualty had an initial obligation to defend Penske. Accordingly, our review is limited by the four-corners rule.

¶13 We determine whether an insurer has an obligation to defend its insured by comparing the factual allegations of the complaint with the terms of the insurance policy. ***Estate of Sustache***, 311 Wis. 2d 548, ¶20. The insurer's obligation to defend is triggered if the allegations within the four corners of the complaint would, if proved, result in a covered loss. ***Fireman's Fund Ins. Co. of Wis. v. Bradley Corp.***, 2003 WI 33, ¶19, 261 Wis. 2d 4, 660 N.W.2d 666. When comparing the allegations in the complaint to the terms of the policy, the allegations in the complaint are liberally construed and we resolve any doubt regarding the obligation to defend in favor of the insured. ***Id.***, ¶20. Provided the allegations in the complaint state a claim that is arguably covered under the policy, the insurer has an obligation to defend. *See* ***id.***

¶14 The general approach we take in interpreting an insurance contract, is to first examine the policy's insuring agreement to determine whether the agreement makes an initial grant of coverage for the plaintiff's claim. ***Olson***, 338

Wis. 2d 215, ¶41. If the policy does not, our analysis concludes with a determination that there is no coverage, and thus no obligation to defend. *See* ***Estate of Sustache***, 311 Wis. 2d 548, ¶23. If the plaintiff's claim triggers the initial grant of coverage, we next determine whether any of the policy's exclusions apply and if so, then whether an exception to an exclusion reinstates coverage. ***Olson***, 338 Wis. 2d 215, ¶41.

¶15 In construing the terms of the policy, our interpretation is a legal inquiry that we conduct independently of the circuit court. ***Estate of Sustache***, 311 Wis. 2d 548, ¶18. The goal of our inquiry is to determine and give effect to the intentions of the contracting parties. ***Wisconsin Label Corp. v. Northbrook Prop. & Cas. Ins. Co.***, 2000 WI 26, ¶23, 233 Wis. 2d 314, 607 N.W.2d 276. We interpret an insurance policy as it would be understood by a reasonable person in the insured's position, ***id.***, ¶25, and construe any ambiguity in coverage against the insurer. ***Estate of Sustache***, 311 Wis. 2d 548, ¶21.

¶16 Turning to the first inquiry, at the time of Frank's accident, Chambers & Owen held a commercial automobile policy issued by General Casualty. In a separate endorsement entitled "Lessor-Additional Insured and Loss Payee," Penske was identified as "Additional Insured (Lessor)." This endorsement, which modified insurance provided under a business auto coverage form, a business auto physical damage coverage form, a garage coverage form, a motor carrier coverage form, and a truckers coverage form, provided in relevant part:

> **A. Coverage**
>
> 1. Any "leased auto" designated or described in the Schedule will be considered a covered "auto" you own and not a covered "auto" you hire or borrow.

> 2. For a "leased auto" designated or described in the Schedule, **Who is An Insured** is changed to include as an "insured" the lessor named in the Schedule. However, the lessor is an "insured" only for "bodily injury" or "property damage" resulting from the acts or omissions by:
>
> a. You
>
> b. Any of your "employees" or "agents"; or
>
> c. Any person, except the lessor or any "employee" or agent of the lessor, operating a "leased auto" with the permission of any of the above.

¶17 The plain language of the policy identified Penske as an insured only for bodily injury or property damage resulting from the acts or omissions of Chambers & Owen, its employees or agents, or those using the leased vehicle with the permission of Chambers & Owen, its employees or its agents. Accordingly, we consider whether, liberally construed, the complaint alleged sufficient facts that if proved would have established that Frank's bodily injuries resulted from the acts or omissions by Chambers & Owen, its agents or its employees, or their authorized user.

¶18 The Ritters' complaint alleged that the light in the cargo area of the truck used by Frank when he was injured malfunctioned, which was a longstanding problem previously reported to Penske "on several occasions." The complaint alleged that "[w]hile trying to work in the dark cargo area of the truck, Plaintiff Frank Ritter was struck by several large plastic totes that fell on him causing serious bodily injuries." The complaint further alleged that Penske was "negligent in the approval, leasing, regular maintenance, regular examination, and repair of the vehicle Plaintiff Frank Ritter operated on the day of the accident…."

¶19 The complaint did not set forth any allegations that Frank's injuries resulted from the acts or omissions of Chambers & Owen, its employees or its agents, which would have triggered coverage for Penske under the policy. In fact, Penske acknowledges in its appellate brief that "[t]he Ritters blamed Penske—and nobody else—for [Frank's] injuries." Penske nevertheless argues that an obligation to defend existed within the four corners of the complaint because Frank's accident was not only caused by a lack of light, but also by whatever caused the totes to fall and the complaint left in question the cause of the falling totes. Penske argues that because the complaint left "the cause of the falling totes in doubt" a debatable question remained as to "whether Chambers & Owen (or anyone else) caused them to fall." Penske equates the absence of any allegations regarding the cause of the falling totes to leaving the issue in doubt and thus arguably covered under the policy. Penske also appears to be suggesting that the actions or inactions of Chambers & Owen's night loading crew arguably had something to do with Frank's injuries and that because the night crew would qualify as either employees or agents of Chambers & Owen, Penske is an additional insured under the policy.

¶20 We find Penske's arguments to be without merit. First, Penske offers no authority for the proposition that when a complaint leaves the cause of the falling totes fairly debatable, the result is that coverage is fairly debatable. More importantly, the complaint does not raise any issue regarding the cause of the falling totes and specifically contains no allegations or reference to the night crew. We fail to discern why the absence of evidence in this respect makes it fairly debatable that Chambers & Owen, or its employees or agents thereof, were the cause.

¶21 We read Penske's brief as arguing that even if the Ritters' complaint does not trigger coverage under the plain terms of the policy, we should nevertheless conclude that there is coverage under the policy because Penske had a reasonable expectation of coverage in light of the fact that it was named as an additional insured under the policy. Penske asserts that this case is "governed" by ***Mikula v. Miller Brewing Co.***, 2005 WI App 92, 281 Wis. 2d 712, 701 N.W.2d 613, wherein this court determined that Miller Brewing Company was an additional insured for purposes of liability coverage under an additional insured endorsement. We disagree.

¶22 In ***Mikula***, Miller Brewing hired a general contractor to install windows and perform other improvements at Miller Brewing's facility. The general contractor subcontracted out the replacement of the windows and, in the course of replacing the windows, an employee of the subcontractor sustained injures when a door to a cargo elevator slammed together, injuring the employee's hand. ***Id.***, ¶¶3-5. The employee brought suit against Miller Brewing, who tendered its defense to the general contractor's liability insurer, seeking coverage as an additional insured under the general contractor's general liability insurance policy. ***Id.***, ¶6. The additional insured endorsement in that policy provided that Miller was "an additional insured only with respect to liability arising out of [the general contractor's] ongoing operations performed for that insured." ***Id.***, ¶3. The issue before this court was whether Miller Brewing was an additional insured for its own negligence, which depended on whether the insured party's injuries arose out of the general contractor's ongoing operations for Miller Brewing. *See* ***id.***, ¶29. We ruled that Miller Brewing was an additional insured in light of the broad language "arising out of" and "ongoing operations" utilized in the additional

insured provision, which would lead an additional insured to reasonably expect coverage under. ***Id.***, ¶29. We explained:

> With these definitions in mind, a common sense reading of the relevant language in the additional insured endorsement—"[s]uch person or organization [Miller] is an additional insured only with respect to liability arising out of your [general contractor's] ongoing operations performed for that insured"—indicates that Miller is an additional insured with regard to Mikula's claims. That is, [the general contractor] hired [the subcontractor] to perform certain tasks as part of the ongoing operations [the general contractor] was performing for Miller. It was alleged in the complaint and, in fact, it was stipulated, that [the] employee, was in the course of his work when injured. Thus, Miller's liability "arose out" of [the general contractor's] ongoing operations. Nothing in the language of the policy indicates that Miller's coverage as an additional insured … is limited solely to the liability Miller might be exposed to as a result of [the general contractor's] negligence. The language is very broad.

Id., ¶22.

¶23 Unlike ***Mikula***, the language in the additional insured endorsement in the present case does not utilize broad language "arising out of [the insured's] ongoing operations for [the additional insured]." Moreover, unlike ***Mikula***, the language of the policy specifically limits Penske's coverage to the liability Penske might be exposed to as a result of the negligence of Chambers & Owen, its employees or its agents. Accordingly, we reject Penske's assertion that this case is "governed" by ***Mikula***.

¶24 To the extent that Penske is claiming that we should conclude that there is an initial grant of coverage under this policy because certain terms of the policy are void under Wisconsin Law, which renders other terms under the policy ambiguous, which in turn leads to Penske's reasonable expectation of coverage in light of the fact that it was named as an insured under the policy, we reject Penske's argument. *See, e.g.,* ***Folkman v. Quamme***, 2003 WI 116, ¶¶16-17, 264

Wis. 2d 617, 665 N.W.2d 857 (where ambiguity exists in a grant of coverage, we will construe the policy against the drafter and in favor of the reasonable expectations of the insured). The language that Penske claims is void is contained in a "nuclear energy liability exclusion endorsement." We fail to see how language contained in that endorsement is relevant, and Penske does not provide an explanation.

¶25 Finally, Penske argues that if they are not covered insureds for purposes of the Ritters' claim, then the policy must be "illusory." An insurance policy's coverage is illusory when there are "no circumstances" when an insured can collect. ***Kaun v. Industrial Fire & Cas. Ins. Co.***, 148 Wis. 2d 662, 670, 436 N.W.2d 321 (1989). Here, Penske would be an insured to the extent that personal injuries or property damage were the result of conduct of Chambers & Owen, its employees, agents, or authorized users. Penske's contention that the policy is illusory is without merit.

CONCLUSION

¶26 For the reasons discussed above, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.